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CHRISTINE FITZGERALD &
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRISTINE FITZGERALD &
CONNIE ARNOLD,

Plaintiffs,

v.

FAIRMONT HOTELS RESORT INC.;
FAIRMONT PLAZA PARTNERS,
L.L.C.; F.C. FAIRMONT, L.L.C.;
LIGHT TOWER ASSOCIATES L.P.;
LIGHT TOWER ASSOCIATES I,
L.L.C.; and DOES 1 through 25,
Inclusive,

CASE NO.

Civil Rights

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF: DENIAL OF
DISABLED ACCESS; VIOLATION OF
TITLE III OF THE AMERICANS WITH
DISABILITIES ACT; VIOLATION OF
CALIFORNIA HEALTH AND SAFETY
CODE §19955, ET. SEQ.,
CALIFORNIA CIVIL CODE §§54 AND
54.1; AND RELATED CODES AND
REGULATIONS**

DEMAND FOR JURY TRIAL

_____/

Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD, on
behalf of themselves and other similarly situated disabled
persons, hereby complain of defendants FAIRMONT HOTELS RESORT
INC.; FAIRMONT PLAZA PARTNERS, L.L.C.; F.C. FAIRMONT, L.L.C.;
LIGHT TOWER ASSOCIATES L.P.; LIGHT TOWER ASSOCIATES I, L.L.C.;
and DOES 1 through 1 through 35, Inclusive (hereafter
"defendants"), and demand a trial by jury, and alleges as
follows:

INTRODUCTION:

1. Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD are physically disabled wheelchair users who allege that they were discriminated against on the basis of their physical disability while guests at the FAIRMONT HOTEL, located at 170 South Market Street, San Jose, California. Plaintiffs further allege that the FAIRMONT HOTEL (hereinafter, "Hotel" or "Fairmont" is owned, operated, leased by defendants FAIRMONT HOTELS RESORT INC.; FAIRMONT PLAZA PARTNERS, L.L.C.; F.C. FAIRMONT, L.L.C.; LIGHT TOWER ASSOCIATES L.P.; LIGHT TOWER ASSOCIATES I, L.L.C.; and DOES 1 through 1 through 35, Inclusive who have failed to provide full and equal access to physically disabled persons in the use of the public facilities at the FAIRMONT HOTEL, including its hotel registration, public restrooms, common areas, guest rooms, and parking places. Plaintiffs were denied their right to use the public accommodations offered by defendants because said defendants failed to provide guestroom accommodations and facilities usable by disabled persons who require the use of a wheelchair; failed to provide accessible public restrooms serving the Hotel's public areas, restaurant, and meeting and conference rooms, failed to provide proper accessible parking, and failed to comply with existing federal and California laws protecting disabled persons against architectural barriers and facilities discrimination in violation of plaintiffs' rights under federal and California law.

2. On information and belief, defendants also have remodeled or constructed a number of their guest rooms,

1 triggering legal requirements for provision of accessible guest
2 rooms at a variety of prices and locations, and additionally
3 have an obligation to make a minimum number of hotel guest
4 rooms accessible to comply with ADA standards. The guestrooms
5 that defendants have modified and represented to be
6 "handicapped accessible" are not properly accessible for use by
7 physically disabled persons, according to federal and state
8 accessibility standards. Due to defendants' failure to provide
9 properly accessible facilities in violation of both federal and
10 California legal requirements, plaintiffs suffered violation of
11 their civil rights to full and equal access, were embarrassed
12 and humiliated, and suffered statutory and general damages.
13 Plaintiffs seek injunctive relief requiring provision of access
14 under the Americans With Disabilities Act of 1990, §308(a), and
15 injunctive relief and damages under California law.

16 3. At all times herein mentioned, defendants failed to
17 provide "full and equal access" as required by law, and failed
18 to modify their policies and practices to provide their goods
19 and services in a non-discriminatory manner to persons with
20 mobility disabilities, including accepting reservations for
21 guestrooms with roll-in showers and then failing to reserve
22 said rooms for disabled guests. Defendants maintained and
23 continue to maintain a major hotel facility, dining areas and
24 public accommodations which illegally deny full and equal
25 access to plaintiffs and other physically disabled persons who
26 use wheelchairs by failing to have properly configured
27 accessible guestrooms and other hotel facilities, although such
28 guestrooms and facilities are available to and usable by non-

1 disabled persons.

2 4. Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD are
3 each a "physically handicapped" or "physically disabled"
4 person, who require the use of a motorized wheelchair for
5 mobility. Plaintiffs wish to return to stay as guests of the
6 FAIRMONT HOTEL, to attend public functions presented at the
7 FAIRMONT HOTEL, and to use the premises' restaurant, but cannot
8 do so until the Hotel is made accessible and barriers to
9 disabled access are removed in the manners complained of
10 herein.

11 5. Defendants were required by law to provide accessible
12 guestrooms and other hotel facilities and amenities on each
13 occasion that "alterations, structural repairs or additions"
14 were performed to such facilities pursuant to legal standards
15 then in effect, pursuant to Health & Safety Code §19959.
16 Further, defendants fail to provide properly configured and
17 located disabled-accessible parking spaces serving guests at
18 the Hotel.

19 6. Plaintiffs seek damages for the continuing violation
20 of their civil rights, plaintiffs also request that this Court
21 grant injunctive relief, requiring defendants to comply with
22 both California and Federal laws requiring access for the
23 physically disabled so long as defendants continue to operate
24 their Hotel as a public facility.

25
26 **JURISDICTION AND VENUE**

27 7. This Court has jurisdiction of this action pursuant
28 to 28 U.S.C. 1331 for violations of the Americans with

1 Disabilities Act of 1990, 42 U.S.C. 12101, et seq. Pursuant to
 2 pendant jurisdiction, attendant and related causes of action,
 3 arising from the same facts, are also brought under California
 4 law, including but not limited to violations of California
 5 Health & Safety Code §§ 19955 et seq., including §19959; Title
 6 24 California Code of Regulations; and California Civil Code §§
 7 54 and 54.1, et seq.

8 8. Venue is proper in this court pursuant to 28 U.S.C.
 9 §1391(b) and is founded on the fact that the real property,
 10 which is the subject of this action, is located in this
 11 district and that plaintiffs causes of action arose in this
 12 district.

13 9. The case should be assigned to the San Jose
 14 intradistrict as the real property, which is the subject of
 15 this action, is located in the San Jose intradistrict and
 16 plaintiff's causes of action arose in the San Jose
 17 intradistrict (a property located in San Jose).
 18

19 **PARTIES**

20 10. Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD,
 21 are each a qualified "physically handicapped" or "physically
 22 disabled" persons as these terms are used under California law
 23 and under federal laws including but not limited to Title III
 24 of the Americans with Disabilities Act of 1990 who require the
 25 use of wheelchairs for mobility. Plaintiffs are informed and
 26 believe that each of the defendants FAIRMONT HOTELS RESORT
 27 INC.; FAIRMONT PLAZA PARTNERS, L.L.C.; F.C. FAIRMONT, L.L.C.;
 28 LIGHT TOWER ASSOCIATES L.P.; LIGHT TOWER ASSOCIATES I, L.L.C.;

1 and DOES 1 through 1 through 35, Inclusive, is the agent,
 2 ostensible agent, alter ego, master, servant, employer,
 3 employee, representative, franchiser, franchisee, joint
 4 venturer, partner, associate, parent company, subsidiary,
 5 department, representative, agency, agent, or such similar
 6 capacity, of each of the other defendants, and was at all times
 7 acting and performing, or failing to act or perform, within the
 8 course and scope of his, her or its authority as agent,
 9 ostensible agent, alter ego, master, servant, employer,
 10 employee, representative, franchiser, franchisee, joint
 11 venturer, partner, associate, parent company, subsidiary,
 12 department, representative, agency, agent, or such similar
 13 capacity, and with the authorization, consent, permission or
 14 ratification of each of the other defendants, and is
 15 responsible in some manner for the acts and omissions of the
 16 other defendants in proximately causing the violations and
 17 damages complained of herein, and have approved or ratified
 18 each of the acts or omissions of each other defendant, as
 19 herein described. Plaintiffs will seek leave to amend this
 20 complaint when the true names, capacities, connections, and
 21 responsibilities of defendants FAIRMONT HOTELS RESORT INC.;
 22 FAIRMONT PLAZA PARTNERS, L.L.C.; F.C. FAIRMONT, L.L.C.; LIGHT
 23 TOWER ASSOCIATES L.P.; LIGHT TOWER ASSOCIATES I, L.L.C.; and
 24 DOES 1 through 1 through 35, Inclusive, are ascertained.

25 11. At all relevant times, defendants FAIRMONT HOTELS
 26 RESORT INC.; FAIRMONT PLAZA PARTNERS, L.L.C.; F.C. FAIRMONT,
 27 L.L.C.; LIGHT TOWER ASSOCIATES L.P.; LIGHT TOWER ASSOCIATES I,
 28 L.L.C.; and DOES 1 through 1 through 35, Inclusive, were and

are the owners, operators, lessors and/or lessees of the Fairmont Hotel, located at or near 170 South Market Street, San Jose, California, and its facilities (hereinafter sometimes referred to as the "Fairmont," "Hotel," or the "Buildings"). The hotel's parking facilities, entrances, interior and exterior paths of travel, public restrooms, registration counters, guestrooms, health club, pool and other facilities are each a "public accommodation or facility" subject to the requirements of California Health & Safety Code §19955 et seq. and of the California Civil Code, §§ 54, 54.1, and 54.3. At all times relevant to this complaint, defendants have held these facilities open to public use.

12. On information and belief, each such facility has, since July 1, 1982, undergone new construction, "alterations, structural repairs, and additions," each of which has subjected the Fairmont Hotel and its public facilities to disabled access requirements pursuant to Health & Safety Code § 19959, and relevant provisions of Title 24 of the California Code of Regulations (hereinafter, "Title 24")

13. The facilities within the subject Hotel are each a "public accommodation or facility," subject to the requirements of the California Health and Safety Code, §§ 19955, et seq., of California Civil Code §§ 54, et seq. Such buildings are also "public accommodations" or "commercial facilities" subject to the requirements of §§ 302 and 303 of the Americans with Disabilities Act of 1990 (hereinafter also called the "ADA").

FACTUAL STATEMENT

1 14. On or about October 2, 2002, plaintiff Connie Arnold
2 telephoned the Hotel to make a reservation for an accessible room
3 for two for a one-night stay on October 21, 2002, specifically
4 requesting a "roll-in" shower. Plaintiff Arnold made several
5 more calls to the Hotel to verify that the Hotel would provide an
6 accessible room with a roll-in shower, including a call on
7 October 20, 2002.

8 15. On October 21, plaintiffs arrived at the Hotel and
9 found that the parking structure for the Hotel would not
10 accommodate a disabled accessible van and that there was valet
11 parking available, but no accessible drop off lane. Plaintiffs
12 had to park and disembark on street parking because of the lack
13 of van accessible parking.

14 16. Prior to registering at the Hotel, plaintiffs had
15 dinner at the Grill Restaurant. While having dinner, plaintiff
16 Connie Arnold had a need for the restroom, but had difficulty
17 entering the women's restroom serving the Grill because of its
18 excessive door weight. She also noted the lack of any accessible
19 signage. Plaintiff Arnold also had difficulty closing the toilet
20 stall door because of the configuration and the lack of a self-
21 closing locking mechanism on the toilet stall door. A chair also
22 blocked turning space within the "accessible" toilet stall.
23 Plaintiff Arnold also had difficulty using the restroom because
24 it was too high. On information and belief, this restroom was
25 not properly accessible for use by disabled persons in other
26 respects.

27 17. Following their meal, plaintiff Arnold went to the
28 Hotel registration desk to register for her guest room.

1 Plaintiffs were registered into Room 626. At the registration
2 desk plaintiff Connie Arnold had difficulty because of the
3 excessive height of the registration counter so that she could
4 complete her transaction with the Hotel staff until the Hotel
5 staff member came around the counter to get plaintiff's credit
6 card. After registering, plaintiffs proceeded to Room 626 and
7 required assistance opening the guest room door as this
8 purportedly "accessible" guest room door was excessively heavy
9 and required unlocking with a "card key" that plaintiff was
10 unable to operate

11 18. Once inside the room, plaintiff Arnold discovered that
12 the bathroom had no roll-in shower as she had been advised she
13 would have reserved for her use, and that the bathroom was
14 otherwise very difficult to use due to its configuration,
15 including but not limited to, no tub transfer bath bench, a
16 toilet improperly mounted in the middle of a narrow room, and the
17 sink counter was too high for her to reach the water and
18 amenities, and had exposed pipes. Plaintiff Arnold also had
19 difficulty using the toilet and reaching the flush lever because
20 of its improper mounting and location. Although plaintiff Arnold
21 made further attempts to get a more accessible guest room, she
22 was told that no rooms with a roll-in shower were available and
23 that all other "accessible" rooms were already occupied. Because
24 it was approximately 11 pm at this point, it was too late for
25 plaintiffs to find an accessible guest room at another hotel;
26 they accepted use of Room 626.

27 19. The following morning, when plaintiff Arnold had
28 breakfast at the Fairmont Hotel's Fountain Restaurant, she

1 discovered she could not get to the buffet breakfast area because
2 of the dining table and chairs were too closely configured and
3 the buffet table foods were too high for her to reach. She also
4 had difficulty using the restroom serving the Fountain
5 Restaurant, including an improperly placed toilet flush valve.
6 Plaintiff also had problems using the sink because of its height,
7 and other difficulties with the configuration of the restroom.

8 20. During her stay at the Hotel plaintiff Arnold went up
9 to the 4th floor to use the pool area. She had difficulty using
10 the pool area as access to the pool area required using a card
11 key that she was unable to use, and finally required assistance
12 from another person to access the pool area. Inside the pool
13 area she discovered that there was no pool lift for her to use to
14 enter the swimming pool, and that the restrooms were inaccessible
15 for her in her wheelchair. She also visited the Health Club and
16 discovered that there were no facilities there usable by disabled
17 persons. She also found that she was unable to use the saunas
18 because of their configuration. Plaintiff Arnold also found that
19 the restroom in the women's locker room was not properly
20 accessible in multiple respects, including the location of the
21 toilet flush lever, the restroom stall's configuration, and the
22 twisting type of door lock.

23 21. When plaintiffs Christine Fitzgerald and Connie Arnold
24 used the Hotel elevators, they had difficulties because the
25 elevator controls were too high and that she could not
26 distinguish the lighting of the controls, and were not properly
27 lit for use by persons with low vision, such as plaintiff
28 Fitzgerald. When plaintiffs attempted to use the women's

1 restroom in the Hotel lobby area near the elevators, they
2 encountered many access problems, including but not limited to
3 the following: the flush lever was improperly located, the sink
4 counter was too high, and the sink pipes were not properly
5 wrapped.

6 22. When plaintiffs attempted to enter the main Hotel
7 "lobby lounge" area they discovered that it appeared that it
8 could only be entered by stairs, with no signage to indicate the
9 location of a ramp or lift. Finally, on inquiry, plaintiff
10 Arnold determined that there was a lift, but the lift was
11 improperly kept locked. Plaintiffs were required to wait while
12 Hotel employees located someone who could unlock the lift and
13 allow her to enter. On information and belief, the physical
14 structure, policy on locking, and configuration of the lift, fail
15 to properly provide "full and equal access" for disabled persons'
16 use as required by law. Further, the switches on the lift were
17 not self-operable and plaintiffs had to again seek assistance
18 when they wanted to use the lift to return from the lounge area
19 to the main lobby floor. As a result of the locked lift and its
20 lack of self-operation, plaintiffs were delayed from 10 to 20
21 minutes before being able to enter the lounge area, by use of the
22 lift, and only then with assistance and without independence.

23 23. Defendants' denial of access has caused plaintiffs to
24 suffer physical, psychological, and emotional injuries as a
25 result of the lack of accessible facilities, including an
26 accessible guestroom, parking and accessible public restroom
27 facilities, and deprived plaintiffs of their Civil Rights,
28 caused them physical, psychological and emotional injuries,

1 including but not limited to humiliation, frustration and
 2 anger, and deprived plaintiff of her independence, self-
 3 sufficiency and autonomy. Defendants have failed and refused
 4 to provide "full and equal access" to plaintiffs causing them
 5 physical, mental and emotional distress, and violation of their
 6 Civil Rights, all to their damages.

7 24. On information and belief, defendants have remodeled a
 8 number of conference, lobby and guestroom facilities at the
 9 hotel, triggering accessible "path of travel" requirements to
 10 each area of alteration, which includes, but is not limited to,
 11 accessible public sanitary facilities and drinking fountains, and
 12 accessible parking facilities, complying with ADA and Title 24
 13 standards. On information and belief, defendants have not
 14 complied with these legal obligations.

15 25. The "removal" of each of these barriers to use by
 16 disabled persons was "readily achievable" under the standards
 17 of §301(9) of the Americans With Disabilities Act of 1990 [42
 18 U.S.C. §12181] at all times herein relevant. The removal of
 19 all such barriers was also required by §303 of the ADA [42
 20 U.S.C. §12183] and California law.

21 26. On information and belief, defendants continue to the
 22 present date to deny "full and equal access" to plaintiffs and
 23 to all other disabled persons, in violation of California law,
 24 including Health & Safety Code §19955 et seq., Civil Code §§ 54
 25 and 54.1, and Title 24 of the California Code of Regulations
 26 (a.k.a. California Building Code). Further, such denial of
 27 access to disabled persons also violates the requirements of
 28 Title III of the federal Americans With Disabilities Act of

1 1990, §301, et seq. [42 U.S.C. §12181, et seq.].

2 27. At all times herein mentioned, defendants were fully
3 aware that significant numbers of potential users of their
4 public facility are and will be physically disabled persons.
5 As a hotel, the Fairmont specifically reserves guestrooms for
6 people with disabilities indicating that they will be provided
7 with "wheelchair accessible rooms" and a "roll-in shower," but
8 failed to modify their policies and procedures to ensure that
9 persons with disabilities are provided the accessible rooms
10 they reserve. Further defendants know that some of the
11 Fairmont patrons would be and were physically disabled
12 wheelchair users and other mobility-impaired disabled persons,
13 and would have need of facilities that comply with California
14 Title 24 and ADAAG standards for accessible facilities.
15 Despite this knowledge, defendants installed and maintained the
16 physical barriers complained of, and failed to remove these
17 barriers, and have failed to provide fully accessible
18 guestrooms, parking, restrooms and other facilities as required
19 by state and federal law. Defendants have ignored specific
20 complaints about the lack of proper disabled access by
21 plaintiffs and other wheelchair users. Defendants have
22 continued their illegal and discriminatory policies and
23 practices despite actual knowledge that people with
24 disabilities regularly attempt to patronize the Hotel and
25 encounter illegal barriers when they do so.

26 28. At all times herein mentioned, defendants knew, or in
27 the exercise of reasonable diligence should have known, that
28 their barriers and practices at their Fairmont Hotel violated

1 disabled access requirements and standards and had a
 2 discriminatory affect upon plaintiffs and upon other physically
 3 disabled persons, but defendants have refused to rectify the
 4 violations, and presently continue a course of conduct that
 5 discriminates against plaintiffs and similarly situated
 6 persons.

7 29. On information and belief, defendants have violated
 8 State and Federal disabled access requirements in other
 9 respects at the subject Fairmont, including the requirements of
 10 the Americans With Disabilities Act of 1990, according to
 11 proof.

12 30. On information and belief, the subject Fairmont Hotel
 13 denied full and equal access to disabled persons in other
 14 respects due to non-compliance with the requirements of the law
 15 from the American Standards Association (as incorporated by
 16 §19955 Health and Safety Code); of Title 24 of the California
 17 Code of Regulations; of Health & Safety Code §§ 19955, et seq.;
 18 and of Civil Code §§ 54 and 54.1, et seq., according to proof.

19 **FIRST CAUSE OF ACTION:**
 20 **BREACH OF STATUTORY PROTECTIONS FOR PHYSICALLY DISABLED PERSONS**

21 31. Plaintiff repleads and incorporates by reference, as
 22 if fully set forth again herein, the allegations contained in
 23 Paragraphs 1 through 32, above.

24 32. Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD,
 25 was and is at all times relative to this complaint a
 26 "physically disabled" person or "physically handicapped" person
 27 under standards as defined by all California statutes using
 28 these terms. Plaintiffs are also each an "individual with a

disability" as defined by § 54(b) Civil Code, as well as §3(2) of the Americans With Disabilities Act of 1990, a violation of which Act is incorporated by reference as a separate violation of §§ 54(c) and 54.1(d) California Civil Code. Hereinafter, the words "person with a disability," "physically disabled" and "physically handicapped" are used interchangeably, as these words have similar or identical common usage and legal meaning, but the legislative scheme in Part 5.5 of the Health and Safety Code uses the term "physically handicapped persons" and the Unruh Civil Rights Act, §§ 54, 54.1, 54.3 and 55, and other statutory measures refer to protection of the rights of "physically disabled persons" or "persons with disabilities."

33. Health & Safety Code § 19955 provides in pertinent part:

(a) The purpose of this part is to insure that public accommodations or facilities constructed in this state with private funds adhere to the provisions of Chapter 7 (commencing with § 4450) of Division 5 of Title 1 of the Government Code. For the purposes of this part "public accommodation or facilities" means a building, structure, facility, complex, or improved area, which is used by the general public and shall include auditoriums, hospitals, theaters, restaurants, hotels, motels, stadiums, and conventions centers.

34. Health and Safety Code §19956, which appears in the same chapter as 19955, provides, in pertinent part: "[a]ll public accommodations constructed in this state shall conform to the provisions of Chapter 7 (commencing with § 4450) of Division 5 of Title 1 of the Government Code...."

35. Section 19956 Health & Safety Code was operative July 1, 1970, and is applicable to all public accommodations

1 constructed or altered after that date. On information and
2 belief, portions of the Fairmont Hotel were constructed and/or
3 altered after July 1, 1970, and portions of the subject
4 buildings were structurally remodeled, altered and have
5 undergone structural repairs or additions after July 1, 1970.
6 Such construction required such building and its public
7 accommodation facilities to be subject to the requirements of
8 Part 5.5, §§ 19955, et seq., of the Health and Safety Code,
9 which requires provision of access upon "alterations,
10 structural repairs or additions" per §19959 Health & Safety
11 Code, or upon a change of occupancy (a form of "alteration").

12 36. Pursuant to the authority delegated by Government
13 Code §4450, et seq., the State Architect promulgated
14 regulations for the enforcement of these provisions. Effective
15 January 1, 1982, Title 24 of the California Administrative Code
16 adopted the California State Architect's Regulations and these
17 regulations must be complied with as to any modifications of
18 the subject buildings occurring after that date. Any
19 alterations of the buildings after January 1, 1982 required
20 compliance with the Title 24 regulations then in effect,
21 including that an accessible path of travel leading to such
22 facility from the adjoining public right of way.

23 37. Plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD,
24 are informed and believe and therefore alleges that defendants,
25 and their predecessors in interest as owners, operators and/or
26 lessors of the subject Hotel (for which the defendants as
27 current owners, operators and/or lessors of the building are
28 responsible), and each of them caused the subject properties to

1 be constructed, altered and maintained in such a manner that
2 physically disabled persons were denied full and equal access
3 to, within and throughout said facilities, and full and equal
4 use of said buildings. Further, on information and belief,
5 defendants and each of them have continued to maintain and
6 operate such Hotel and its facilities in such condition up to
7 the present time, despite actual and constructive notice to
8 such defendants, and each of them, that the configuration of
9 the buildings was in violation of the Civil Rights of disabled
10 persons, such as plaintiffs CHRISTINE FITZGERALD and CONNIE
11 ARNOLD. Such construction, modification, ownership, operation,
12 maintenance and practices of such a public facility is in
13 violation of law as stated in Part 5.5, Sections 19955ff Health
14 and Safety Code, §§ 54 and 54.1, et seq., Civil Code, and
15 elsewhere in the laws of California.

16 38. On information and belief, the subject Hotel and the
17 defendants and each of them have denied full and equal access
18 to disabled persons in other respects due to non-compliance
19 with requirements of Title 24 of the California Code of
20 Regulations, and of other provisions of disabled access legal
21 requirements. Additionally, maintaining the barriers specified
22 in this complaint is independently a violation of both Title 24
23 of the California Building Code, and of §§ 54 and 54.1 Civil
24 Code and their guarantee of "full and equal" access to all
25 public facilities (as pled in the second cause of action, and
26 also repled and incorporated herein by reference, as if fully
27 restated full and equal access to, within and throughout said
28 facilities, and full and equal use of said buildings. Further,

on information and belief, defendants and each of them have continued to maintain and operate such Hotel and its facilities in such condition up to the present time, despite actual and constructive notice to such defendants, and each of them, that the configuration of the buildings was in violation of the Civil Rights of disabled persons, such as plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD. Such construction, modification, ownership, operation, maintenance and practices of such a public facility is in violation of law as stated in Part 5.5, Sections 19955ff Health and Safety Code, §§ 54 and 54.1, et seq., Civil Code, and elsewhere in the laws of California.

39. On information and belief, the subject Hotel and the defendants and each of them have denied full and equal access to disabled persons in other respects due to non-compliance with requirements of Title 24 of the California Code of Regulations, and of other provisions of disabled access legal requirements. Additionally, maintaining the barriers specified in this complaint is independently a violation of both Title 24 of the California Building Code, and of §§ 54 and 54.1 Civil Code and their guarantee of "full and equal" access to all public facilities (as pled in the second cause of action, and also repled and incorporated herein by reference, as if fully restated hereafter), in conjunction with §§ 19955ff, per Donald v. Café Royale, (1990) 218 Cal.App.3d 168.

40. Injunctive Relief - The acts and omissions of defendants as complained of continue on a day-to-day basis to have the effect of allowing defendants to wrongfully exclude plaintiff, and other similarly situated members of the public

1 who are physically disabled, from full and equal access to the
 2 Fairmont Hotel. Such acts and omissions are the continuing
 3 cause of humiliation and mental and emotional suffering to
 4 plaintiffs and other similarly situated persons in that these
 5 actions treat them as inferior and second class citizens and
 6 serve to discriminate against them, so long as defendants do
 7 not provide a properly accessible, safe and equal use of such
 8 facilities. Said acts have proximately caused and will
 9 continue to cause irreparable injuries to plaintiffs if not
 10 enjoined by this court.

11 41. Plaintiffs seek injunctive relief, pursuant to §19953
 12 Health and Safety Code and §55 Civil Code, prohibiting those of
 13 the defendants that currently own, operate, and/or lease (from
 14 or to) the subject Fairmont Hotel, from maintaining
 15 architectural barriers to the use by disabled persons of public
 16 accommodations and facilities, in violation of Part 5.5, §§
 17 19955ff Health and Safety Code. Plaintiffs seek to require
 18 such defendants to create safe and properly accessible
 19 facilities.

20 42. Attorney Fees - As a result of defendants' acts and
 21 omissions in this regard, plaintiffs have been required to
 22 incur legal expenses and hire attorneys in order to enforce
 23 plaintiffs' rights and that of other similarly situated
 24 persons, and to enforce provisions of the law protecting access
 25 for the disabled and prohibiting discrimination against the
 26 disabled, and to take such action both in their own interest
 27 and in order to enforce an important right affecting the public
 28 interest. Plaintiffs therefore seek recovery of all reasonable

attorney fees, litigation expenses and costs incurred, pursuant to the provisions of § 1021.5 of the Code of Civil Procedure. Plaintiffs additionally seek attorney fees and costs pursuant to §19953 Health and Safety Code.

WHEREFORE, plaintiffs pray for relief as hereinafter stated.

**SECOND CAUSE OF ACTION:
VIOLATION OF DISABLED RIGHTS ACT,
CIVIL CODE §§ 54, 54.1, 54.3 ET SEQ., DENIAL OF
FULL AND EQUAL ACCESS TO A PHYSICALLY DISABLED PERSON**

43. Plaintiffs replead and incorporate by reference, as if fully set forth again herein, the allegations contained in paragraphs 1 through 44, above.

44. At all times relevant to this action, California Civil Code §§ 54 and 54.1 has provided that physically disabled persons are not to be discriminated against because of physical handicap or disability. § 54 Civil Code provides:

Individuals with disabilities shall have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.

Section 54.1 Civil Code provides that:

(a) (1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities,... and privileges of all common carriers, airplanes, motor vehicles,...or any other public conveyances or modes of transportation, ... hotels, lodging places, places of public accommodation and amusement or resort, and other places to which the general public is invited, subject only to the conditions or limitations established by law, or state or federal regulations, and applicable alike to all other persons.

1 45. California Civil Code §54.3 provides that any person
2 or corporation who denies or interferes with admittance to or
3 enjoyment of the public facilities as specified in §§ 54 and
4 54.1 Civil Code is liable for each such offense for the actual
5 damages and any amount up to a maximum of three times the
6 amount of actual damages but in no case less than \$1,000 and
7 such attorney fees that may be determined by the Court in
8 addition thereto, suffered by any person denied any of the
9 rights provided in §§ 54, 54.1 and 54.3, for services necessary
10 to enforce those rights.

11 46. As a result of the refusal by defendants and each of
12 them to comply with statutory requirements or otherwise provide
13 reasonable access for disabled persons to the subject public
14 facilities, plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD,
15 and other similarly situated persons, were denied and continue
16 to be denied their rights to full and equal access to, and use
17 of, public facilities, and were and continue to be
18 discriminated against on the sole basis that they are
19 physically disabled and unable to make full and equal use of
20 the facilities. Defendants' acts have caused plaintiffs
21 physical and psychological injuries and pain, including
22 fatigue, stress and strain in attempts to negotiate barriers,
23 and emotional distress and general damages.

24 47. Plaintiffs are each a person within the meaning of
25 Civil Code §§ 54 and 54.1 whose rights have been infringed upon
26 and violated by the defendants. Plaintiffs have been denied
27 full and equal access on a day-to-day basis since the date of
28 their visit of October 21-22, 2002, on each day in which full

1 and equal access to such facility was denied. On information
 2 and belief, defendants have failed to act to provide full and
 3 equal public access to their subject Fairmont Hotel, and
 4 continue to operate in violation of the law and continue to
 5 discriminate against physically disabled persons by failing to
 6 allow access to their buildings. At all times since
 7 plaintiffs' visit to the Fairmont Hotel of October 21-22, 2002,
 8 and on information and belief for periods prior to this date,
 9 defendants were on notice of the requirements of the law
 10 relating to provision for full and equal disabled access.
 11 Especially as defendants were on full notice, each day that
 12 defendants have continued to deny access to disabled persons
 13 constitutes a new and distinct violation of plaintiffs' right
 14 to full and equal access to this public facility, in violation
 15 of §§54 and 54.1, et seq. Civil Code. In the event of a
 16 default judgment, plaintiffs will seek daily damages of \$1,000
 17 per day from the date of plaintiffs' visit to the Fairmont
 18 Hotel until it is brought into full compliance with state and
 19 federal access laws protecting the rights of the disabled, or
 20 until the date of entry of default.

21 48. Further, any violation of the Americans With
 22 Disabilities Act of 1990 (as pled in the Third Cause of Action
 23 hereinbelow, the contents of which are repled and incorporated
 24 herein, word for word, as if separately repled), also
 25 constitutes a violation of § 54(c) and § 54.1(d) California
 26 Civil Code, thus independently justifying an award of damages
 27 and injunctive relief pursuant to California law on this basis,
 28 including but not limited to Civil Code §§ 54.3 and 55.

1 49. Plaintiffs have been damaged by defendants' wrongful
 2 conduct and seek the relief that is afforded by §§ 54.1, 54.3
 3 and 55 of the Civil Code. Plaintiffs seek actual damages, and
 4 statutory and treble damages against defendants for all periods
 5 of time mentioned herein. As to those of the defendants that
 6 currently own, operate, and/or lease (from or to) the subject
 7 Fairmont Hotel, plaintiffs seek preliminary and permanent
 8 injunctive relief to enjoin and eliminate the discriminatory
 9 practices and barriers that deny equal access for disabled
 10 persons, and for reasonable attorney fees.

11 50. WHEREFORE, plaintiffs ask this Court to enjoin any
 12 continuing refusal by the defendants that currently own,
 13 operate, and or lease (from or to) the subject Fairmont Hotel,
 14 to grant such access to plaintiffs and other similarly situated
 15 disabled persons, or alternatively to enjoin operation of the
 16 subject Fairmont Hotel as a public accommodation, until such
 17 defendants comply with all applicable statutory requirements
 18 relating to access to physically disabled persons, and that the
 19 Court award statutory attorney fees, litigation expenses and
 20 costs pursuant to Civil Code §55, Code of Civil Procedure
 21 §1021.5, and Health & Safety Code §19953, and as further prayed
 22 for herein.

23 WHEREFORE, plaintiffs pray for damages and injunctive
 24 relief as hereinafter stated.

25
 26 **THIRD CAUSE OF ACTION:**
 27 **VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990**
 42 USC § 12101ff

28 51. Plaintiffs replead and incorporate by reference, as

1 if fully set forth again herein, the factual allegations
 2 contained in Paragraphs 1 through 51, above.

3 52. Pursuant to law, in 1990 the United States Congress
 4 made findings per 42 U.S.C. §12101 regarding physically
 5 disabled persons, finding that laws were needed to more fully
 6 protect "some 43 million Americans with one or more physical or
 7 mental disabilities," that "historically society has tended to
 8 isolate and segregate individuals with disabilities," that
 9 "such forms of discrimination against individuals with
 10 disabilities continue to be a serious and pervasive social
 11 problem," that "the Nation's proper goals regarding individuals
 12 with disabilities are to assure equality of opportunity, full
 13 participation, independent living and economic self sufficiency
 14 for such individuals," and that "the continuing existence of
 15 unfair and unnecessary discrimination and prejudice denies
 16 people with disabilities the opportunity to compete on an equal
 17 basis and to pursue those opportunities for which our free
 18 society is justifiably famous..."

19 53. Congress stated as its purpose in passing the
 20 Americans with Disabilities Act (42 USC § 12101(b)):

21 It is the purpose of this act -

22 (1) to provide a clear and comprehensive national
 23 mandate for the elimination of discrimination against
 individuals with disabilities;

24 (2) to provide clear, strong, consistent, enforceable
 25 standards addressing discrimination against
 individuals with disabilities;

26 (3) to ensure that the Federal government plays a
 27 central role in enforcing the standards established
 28 in this act on behalf of individuals with
 disabilities; and

1 (4) to invoke the sweep of Congressional authority,
 2 including the power to enforce the 14th Amendment and
 3 to regulate commerce, in order to address the major
 areas of discrimination faced day to day by people
 with disabilities.

4 54. As part of the Americans with Disabilities Act,
 5 Public Law 101-336, Congress passed "Title III - Public
 6 Accommodations and Services Operated by Private Entities"
 7 (42 USC 12181ff). Among "private entities" which are
 8 considered "public accommodations" for purposes of this title
 9 are a for purposes of this title was "an inn, hotel, motel, or
 10 other place of lodging," "a restaurant, bar or other
 11 establishment serving food or drink," and a "convention center,
 12 lecture hall, or other place of public gathering." (§301(7)(A),
 13 (B), and (D) [42 U.S.C. 12181].)

14 55. Pursuant to §302 [42 USC 12182], "[n]o individual
 15 shall be discriminated against on the basis of disability in
 16 the full and equal enjoyment of the goods, services,
 17 facilities, privileges, advantages, or accommodations of any
 18 place of public accommodation by any person who owns, leases,
 19 or leases to, or operates a place of public accommodation."

20 56. Among the general prohibitions of discrimination were
 21 included, in §302(b)(1)(A):

22 §302(b)(1)(A)(i): "DENIAL OF PARTICIPATION. -- It shall
 23 be discriminatory to subject an individual or class of
 24 individuals on the basis of a disability or disabilities of
 25 such individual or class, directly, or through contractual,
 26 licensing, or other arrangements, to a denial of the
 opportunity of the individual or class to participate in or
 benefit from the goods, services, facilities, privileges,
 advantages, or accommodations of an entity."

27 §302(b)(1)(A)(ii): "PARTICIPATION IN UNEQUAL BENEFIT -- It
 28 shall be discriminatory to afford an individual or class of
 individuals, on the basis of a disability or disabilities of
 such individual or class, directly, or through contractual,

1 licensing, or other arrangements with the opportunity to
 2 participate in or benefit from a good, service, facility,
 3 privilege, advantage, or accommodation that is not equal to
 4 that afforded to other individuals."

5 §302(b)(1)(A)(iii): "SEPARATE BENEFIT. -- It shall be
 6 discriminatory to provide an individual or class of
 7 individuals, on the basis of a disability or disabilities of
 8 such individual or class, directly, or through contractual,
 9 licensing, or other arrangements with a good, service,
 10 facility, privilege, advantage, or accommodation that is
 11 different or separate from that provided to other individuals,
 12 unless such action is necessary to provide the individual or
 13 class of individuals with a good, service, facility, privilege,
 14 advantage, or accommodation, or other opportunity that is as
 15 effective as that provided to others."

16 57. Among the specific prohibitions against
 17 discrimination were included: §302(b)(2)(A)(ii): "A failure to
 18 make reasonable modifications in policies, practices or
 19 procedures when such modifications are necessary to afford such
 20 goods, services, facilities, privileges, advantages or
 21 accommodations to individuals with disabilities...;"

22 §302(b)(2)(A)(iii): "A failure to take such steps as may
 23 be necessary to ensure that no individual with a disability is
 24 excluded, denied services, segregated or otherwise treated
 25 differently than other individuals because of the absence of
 26 auxiliary aids and services, unless the entity can demonstrate
 27 that taking such steps would fundamentally alter the nature of
 28 the good, service, facility, privilege, advantage, or
 accommodation being offered or would result in an undue
 burden;"

§302(b)(2)(A)(iv): "A failure to remove architectural
 barriers, and communication barriers that are structural in
 nature, in existing facilities... where such removal is
 readily achievable;"

§302(b)(2)(A)(v): "Where an entity can demonstrate that
 the removal of a barrier under clause (iv) is not readily
 achievable, a failure to make such goods, services, facilities,
 privileges, advantages, or accommodations available through
 alternative methods if such methods are readily achievable."

The acts and omissions of defendants set forth herein were in
 violation of plaintiffs rights under the ADA, Public Law 101-
 336, and the regulations promulgated thereunder, 28 CFR Part

1 36ff.

2 58. The removal of each of the barriers complained of by
3 plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD, as
4 hereinabove alleged were at all times on or after January 26,
5 1992 "readily achievable" under the standards of the Americans
6 With Disabilities Act of 1990.

7 59. Further, at all times herein mentioned, modification
8 of or removal of these barriers was "readily achievable" under
9 the factors specified in the Americans with Disabilities Act of
10 1990, including but not limited to §301(9) [42 U.S.C. 12181],
11 and the Regulations adopted thereto. Further, if defendants
12 are able to "demonstrate" that it was not "readily achievable"
13 for defendants to remove each of such barriers, defendants have
14 failed to make the required services available through
15 alternative methods which were readily achievable, as required
16 by §302 of the ADA [42 U.S.C. 12182].

17 60. "Discrimination" is further defined under §303(a)(2)
18 of the ADA, for a facility or part thereof that was altered
19 after the effective date of §303 of the ADA in such a manner as
20 to affect or that could affect the usability of the facility or
21 part thereof by persons with disabilities, to include per
22 section 303(a)(2) [42 U.S.C. 12183], "a failure to make
23 alterations in such a manner that, to the maximum extent
24 feasible, the altered portions of the facility are readily
25 accessible to and usable by individuals with disabilities,
26 including individuals who use wheelchairs." Additionally, for
27 alterations to areas of a facility involving a "primary
28 function," discrimination under the ADA, per 303(a)(2) (42

U.S.C. 12183), also includes the failure of an entity "to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities."

61. On information and belief, defendants have, since the date of enactment of the ADA, performed alterations (including alterations to areas of primary function) to the subject buildings, and their facilities, public accommodations, and commercial facilities, which fail to provide facilities and paths of travel to such areas that are readily accessible to and usable by individuals with disabilities, in violation of section 303(a)(2), and the regulations promulgated thereunder, 28 CFR Part 36ff.

62. Pursuant to the Americans with Disabilities Act, 42 USC 12188ff, §308, plaintiff is entitled to the remedies and procedures set forth in §204, subsection (a), of the Civil Rights Act of 1964 (42 USC 2000a-3, at subsection (a)), as plaintiff is being subjected to discrimination on the basis of disability in violation of this title or has reasonable grounds for believing that he is about to be subjected to discrimination in violation of §§ 302 and 303. On information and belief, defendants have continued to violate the law and deny the rights of plaintiff and of other disabled persons to access this public accommodation since plaintiffs CHRISTINE FITZGERALD and CONNIE ARNOLD, visit of October 21-22, 2002. Pursuant to §308(a)(2), "[i]n cases of violations of

1 §302(b)(2)(A)(iv)... injunctive relief shall include an order
 2 to alter facilities to make such facilities readily accessible
 3 to and usable by individuals with disabilities to the extent
 4 required by this title."

5 63. As a result of defendants' acts and omissions in this
 6 regard, plaintiff has been required to incur legal expenses and
 7 attorney fees, as provided by statute, in order to enforce
 8 plaintiffs' rights and to enforce provisions of the law
 9 protecting access for disabled persons and prohibiting
 10 discrimination against disabled persons. Plaintiffs therefore
 11 seek recovery of all reasonable attorney fees, litigation
 12 expenses (including expert fees) and costs, pursuant to the
 13 provisions of section 505 of the ADA (42 U.S.C. 12205) and the
 14 Department of Justice's regulations for enforcement of Title
 15 III of the ADA (28 CFR 36.505). Additionally, plaintiffs'
 16 lawsuit is intended not only to obtain compensation for damages
 17 to plaintiffs, but also to require the defendants to make their
 18 facilities accessible to all disabled members of the public,
 19 justifying "public interest" attorney fees pursuant to the
 20 provisions of California Code of Civil Procedure §1021.5.

21 WHEREFORE, plaintiffs pray that this Court grant relief
 22 as hereinafter stated:

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs pray that this Court:

25 1. Issue a preliminary and permanent injunction directing
 26 Defendants to modify the specified public buildings and other
 27 non-conforming facilities and their policies and practices, so
 28 that each provides full and equal access to physically disabled

persons;

2. Retain jurisdiction over the Defendants until such time as the Court is satisfied that Defendants' unlawful policies, practices, acts and omissions complained of herein no longer exist, and will not, recur;

3. Grant a jury trial and award to Plaintiffs all appropriate damages in an amount to be proved at trial;

4. Award to Plaintiffs all costs of this proceeding and award all statutory remedies including statutory attorney fees, litigation expenses and costs, as provided by law; and

5. Grant such other and further relief as this Court may deem just and proper.

Dated: October __, 2003

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LAW OFFICES OF PAUL L. REIN

Attorneys for Plaintiffs
CHRISTINE FITZGERALD and
CONNIE ARNOLD

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury for all claims for which a jury is permitted.

Dated: October __, 2003

PAUL L. REIN
PATRICIA BARBOSA
JULIE MCLEAN
LAW OFFICES OF PAUL L. REIN

Attorneys for Plaintiffs
CHRISTINE FITZGERALD and
CONNIE ARNOLD

CERTIFICATION OF INTERESTED ENTITIES OR PARTIES

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: October __, 2003

PAUL L. REIN
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